SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 1079

GROVER G. ALEXANDER, Petitioner

vs.

CERELES SHARPE, Respondent

STATE OF MAINE, Respondent

vs.

GROVER G. ALEXANDER, Petitioner

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME JUDICIAL COURT OF MAINE

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vs.
CHARLES SHARPE, Respondent

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME JUDICIAL COURT OF MAINE

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The Petitioner, Grover G. Alexander, respectfully prays that a writ of Certiorari issue to review the Judgment and opinion of the Supreme Judicial Court of Maine entered in this proceeding on October 20, 1969.

OPINION BELOW

The Opinion of the Supreme Judicial Court of Maine, not yet reported, appears in the Appendix hereto.

JURISDICTION

The Judgment of the Supreme Judicial Court of Maine was entered on October 20, 1969. No petition for re-hearing was filed in that the Maine Rules of Civil Procedure and/or Maine Rules of Criminal Procedure do not provide for a petition for re-hearing as such. This Petition for a Writ of Certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether Petitioner has been deprived of DUE PROCESS of law as guaranteed by the FIFTH (5th), SIXTH (6th) and FOURTEENTH (14th) AMENDMENTS and ARTICLE III, Paragraph 2 of the Constitution of the United States.

2. Whether Petitioner has been deprived of trial by Jury as guaranteed by ARTICLE III, Paragraph 2 and by the SIXTH (6th) and FOURTEENTH (14th) AMENDMENTS to the Constitution of the United States.

3. Whether Petitioner has been deprived of his right against self-incrimination as guaranteed by the FIFTH (5th) AMENDMENT of the Constitution of the United States.

4. Whether Petitioner's right against twice being put in jeopardy for the same offense as guaranteed by the FIFTH (5th) AMENDMENT to the Constitution of the United States has been violated.

5. Whether the burden of proof against the Petitioner, that of guilt beyond a reasonable doubt, has been met on the record presented in satisfaction of due process as aforesaid.

6. Whether the constitutional rights of the Petitioner have been satisfied with respect to applicable State laws and the interpretation thereof as guaranteed by the FOURTEENTH (14th) AMENDMENT to the Constitution of the United States.

7. Whether the Petitioner's right against excessive fine and punishment has been violated as guaranteed by the EIGHTH (8th) AMENDMENT to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

I MAINE REVISED STATUTES, 1964, VOLUME 8, TITLE 14, which is RULE 42 (a) and (b) of the Maine Rules of Criminal Procedure:

"(a) Summary Disposition. A criminal contempt may be punished summarily if the justice sertifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the justice and entered of record.

(b) Disposition upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the prepara-

tion of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the justice in open court in the presence of the person charged or, on application of an attorney for the state or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The person charged is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a justice, that justice is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

II ARTICLE III, Paragraph 2 of the Constitution of the United States:

" The trial of all crimes, except in cases of impeachment, shall be by Jury...."

III SIXTH (6th) AMENDMENT of the Constitution of the United States:

" In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial Jury of the State and district wherein the crime shall have been committed...."

IV FOURTEENTH (14th) AMENDMENT, Section #1, of the Constitution of the United States:

" No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law...."

V FIFTH (5th) AMENDMENT of the Constitution of the United States:

".... Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law...."

VI ARTICLE I, Section 6(a) of the Constitution of Maine:

" No person shall be deprived of life, liberty or property without due process of law...."

VII ARTICLE I, Section 6 of the Constitution of Maine:

" In all criminal prosecutions, the accused shall have a right....:

To demand the nature and cause of the accusation against him; and have a copy thereof;

To be confronted by the witnesses against him;

To have compulsory process for obtaining witnesses in his favor;

To have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a Jury of vicinity. He shall not be compelled to furnish or give evidence against himself, nor be deprived of his life, liberty, property or privileges, but by judgment of his peers or the law of the land."

VIII. MAINE REVISED STATUTES, 1964 TITLE 4, Section 114:
"The Superior Court may....; punish for contempt; ...."

IX EIGHTH (8th) AMENDMENT of the Constitution of the United States:
"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

X ARTICLE I, Section 9 of the Constitution of Maine:
"Sanguinary laws shall not be passed: all penalties and punishments shall be proportioned to the offence: excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

XI ARTICLE I, Section 8, Constitution of the State of Maine:
"No person, for the same offence, shall be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

On July 6, 1967, during the trial of a personal injury suit, the Petitioner, in the presence of the Jury, stated to the Justice...."I think it demonstrates your prejudice without doubt." The remark followed almost immediately an exchange between Court and Counsel wherein the Court shouted at Petitioner, accused him of being incompetent, and otherwise caused the Petitioner great embarrassment in the presence of the Jury. The exchange began after an incorrect

ruling by the Court adverse to the Petitioner relating to the re-direct examination of a State Police Officer. The sequence of events appears at RECORD-DOCUMENT #3, pages 151-152.

Unfortunately, the precise language of the Court and Petitioner was not recorded by the Reporter. The Reporter's note...."(Court and Counsel for Plaintiff speaking at the same time.)"....is found at RECORD-DOCUMENT #3, page 151. However, the Court apologized to the Jury, and stated in part...."I also wish to apologize on behalf of myself to the extent that I permitted my voice to be raised, and perhaps said something that shouldn't be said in this courtroom." This acknowledgment and apology is setforth at RECORD-DOCUMENT #3, page 159. The Petitioner made a similar apology to the Jury which appears at RECORD-DOCUMENT #3, pages 165-166.

The incident occured;and Court was thereafter adjourned at 4:55 P.M. RECORD-DOCUMENT #3, page 152.

The following morning, July 7, 1967, at 10:00 A.M., the Court convened the Jury. After making the apology indicated above, the Justice turned to the Petitioner and proceeded to summarily hold him in contempt of Court. The Court's remarks to the Petitioner, in the presence of the Jury, are found at RECORD-DOCUMENT #3, pages 162-165. The court ordered Petitioner to pay a Fine of $500 and to be imprisoned in the County Jail for a period of 5 days.

Immediately before the sentence was imposed, Petitioner interrupted the Justice and asked to be heard. The Justice replied...."You may not." No Certificate setting forth the acts of contemptuous conduct was filed. The Petitioner was placed in the custody of the Sheriff based upon the oral order as setforth on RECORD-DOCUMENT #3, page 166.

Petitioner requested and was granted a chamber conference before being committed to the County Jail. At the chamber conference Petitioner asked to be purged of the 5 days confinement. The Court replied: RECORD-DOCUMENT #3, pages 167-168.

"MR. ALEXANDER: Judge, I openly ask you if there is any way I can perhaps purge myself of this confinement? It obviously will work its hardship in terms of, you know, my practice and that sort of thing.

THE COURT: I'm afraid not, Grover. I am not very proud of myself for what I have done and it's the most difficult

this is the only way I could bring to your attention what I think you have done. We have had some experience before but I have never had occasion to get upset. But I'm not the only one, and without attempting to justify anything I just say to you that your reputation with all of the judges, or most of the judges in this particular area makes this no particular surprise. I mean, I think you have had it coming.

MR. ALEXANDER: You really do.

THE COURT: If you didn't have it coming I wouldn't have done it to you."

At 5:00 P.M. on July 7, 1967, Petitioner filed a Petition for Writ of Habeas Corpus and was admitted to liberty on his personal recognizance. A hearing was scheduled on the Writ for 9:30 A.M. July 20, 1967. The Court filed a formal Order of Commitment on July 11, 1967. This Order of Commitment appears on RECORD-DOCUMENT #1, page 38.

The hearing on the Habeas Corpus Petition was held and the transcript of the evidence and testimony is contained in RECORD-DOCUMENT #2. The Writ was denied. Petitioner appealed. This proceeding was docketed as Civil Action Docket #67-670 and Law Court Docket #326. The Supreme Judicial Court declared the conduct of the Petitioner to be...."clearly an act of contempt of Court." However, because the offended Justice had not to that point filed a formal Certificate setting forth the contemptuous conduct as required by Maine Rules of Criminal Procedure, Rule 42 (a), the Law Court sustained Petitioner's Appeal and ordered that the case be remanded to the offended Justice for the filing of the required Certificate and re-sentencing of the Petitioner. This Opinion appears at RECORD-DOCUMENT #1, pages 21-37, and APPENDIX #1.

Pursuant to the Opinion of August 15, 1968, the re-sentencing was held on August 29, 1969. At 10:54 A.M. on that date, Petitioner was presented for the first time the Certificate of Contempt. The Certificate bore the date of August 29, 1968 and was filed at 10:54 A.M. on that date. The Certificate of Contempt appears at RECORD-DOCUMENT #1, pages 19-20. It contained an allegation that...."Petitioner belligerantly shook his finger at the Court while continuing to address the Court, refusing to heed the Court's admonition." In addition, the Certificate alleged that Petitioner had been rude and disrespectful in manner and tone of voice. Petitioner denies such conduct. There is nothing in the record to support such allegation.

Petitioner filed an Appeal from the new judgment of contempt to the Supreme Court. He also filed Motions for a new trial and for acquittal. The Motion for a new trial was filed and sought so as to permit Petitioner to present evidence to refute the Allegation of finger-pointing and rude and disrespectful tone and manner. Petitioner objected; but the same offended Justice heard the Motions and denied both on the ground that such Motions were not seasonably filed. The Motion for acquittal assigned severalviolations of Petitioner's constitutional rights. The Motions appear at RECORD_ DOCUMENT #6, pages A-30 through A-33. The hearing on the Motions appears at Record_Document #6, pages 21-26.

The new Appeal was docketed as criminal action Docket # 9117½ andLaw Court Docket # 356. The matter was argued at the June, 1969 Term of Court. The opinion was rendered on October 20, 1969. The Appeal was denied. The opinion appears at RECORD-DOCUMENT #1, pages 5-16 and APPENDIX #2. Petitioner was granted a Stay of Execution of Sentence and Judgment. He has entered this Petition for Writ of Certiorari in this Honorable Court.

Finally, in this connection, Petitioner states that his seeming acknowledgment of the contempt occurred before the Presiding Justice made the declaration in the chamber conference relating to the reputation of the Petitioner found in RECORD-DOCUMENT #3, pages 167-168. It was at that point, or shortly thereafter, that Petitioner decided to challenge the proceedings. Petitioner acknowledges and regrets the reference to the prejudice of the Justice. Petitioner denies the rude and disrespectful conduct and finger-pointing. Petitioner was at all times pointing and refering to the chalk board about which the State Police Officer was testifying when the incident occurred.

REASONS FOR GRANTING WRIT

I The Supreme Judicial Court of Maine in this instance has decided the substantial federal questions involved here in a way probably not in accord with applicable decisions of the Supreme Court of the United States:

A. DUE PROCESS: The offended Justice in this instance took no action against the Petitioner until the following morning after the alleged contempt. He did not file

the jurisdictional requirement, e.g., the Certificate of Contempt, for a period of 13 months and 22 days. The necessity of immediate and prompt action, the only tolerable basis summary contempt proceedings, was lost; and the Petitioner was then entitled to trial on Notice and by indictment or presentment of the specific charge against him. EX PARTE TERRY, 128, U.S., 289. The Maine Supreme Judicial Court did not defeat the jurisdiction of the presiding Justice to try and punish summarily; and that Petitioner's right of due process had not been violated. The alleged contemptuous conduct involved a criticism of and an accusation of prejudice on the part of the presiding Justice. Under these circumstances, due process seems to require that the matter be tried and determined by a Justice other than the offended one. COOKE vs.UNITED STATES, 267 U.S.,517 at 539 and U.S. vs.BRADT, 294 Fed. 2nd, 879 and SACHER vs. UNITED STATES, 343 U.S.1 at page 8 and OFFUT vs. UNITED STATES, 348 U.S. 11 at page 14. The Maine Supreme Judicial Court held that Petitioner's right of due process had not been violated by the fact that the offended Justice tried and determined the matter summarily at all stages of the proceedings.

B. PRESUMPTION OF INNOCENCE; BURDEN OF PROOF and SELF-INCRIMINATION:

In criminal contempt proceedings, all the usual safeguards of criminal procedure and substance apply. That is, the accused is presumed innocent; he must be proven guilty beyond a reasonable doubt; and he may not be compelled to testify against himself. GOMPERS vs. BUCKS STOVE CO., 221 U.S. 418 at page 444. 31 SUPREME COURT 492 at 499. The Maine S Supreme Judicial Court inferred guilt of the Petitioner as well as the basis of the contempt charge in its Opinion of August 15, 1968 without the required Certificate of Contempt having then been filed in the case for their consideration. Moreover, the Court apparently considered the remarks of the Petitioner after the alleged contempt, both in Court and in chambers, as evidence of guilt. The Opinion of October 20, 1969 affirmed the finding of guilt in the Opinion ofAugust 15, 1968 without re-examination of the facts.which is an extension of the violation of the rights of the Petitioner, respecting the presumption of innocence, burden of proof and self-incrimination. The Maine

October 20, 1969, that with respect to criminal contempt .... " it seems clear that not all the procedural rules relating to the ordinary criminal offenses are applicable...."

The Supreme Judicial Court of Maine in this instance has decided substantial federal questions not heretofore determinedby the Supreme Court of the United States:

A. TRIAL BY JURY: The Maine Constitution provides that in all criminal prosecutions the accused shall have a right to trial by jury of the vicinity. ARTicle I, Section 6. The Statutes conferring the contempt jurisdiction of the Superior Court, MAINE RULES OF CRIMINAL PROCEDURE, Rule 42 (a) and (b) and MAINE REVISED STATUTES, 1964, Title 4, Section 114, do not set a Maximum or Minimum penalty. Therefore, the absence of a specific designation of contempt as a "petty" offense, together with the open-ended authority to punish and the specific constitutional provision of jury trial in all criminal prosecutions, would seem to create in the Petitioner a right to trial by jury in this instance. The present case is distinguished from that of DUNCAN vs. LOUISIANA, 88 S. Ct. 1444; BLOOM vs. ILLINOIS, 88 S. Ct.1477 and CHEFF vs. SCHNACKENBERG, 86 S. Ct. 1523. The Maine Court held that Petitioner was not entitled to trial by Jury.

B. FORMER JEOPARDY: Under the circumstances of this case, the sustaining of the Appeal of August 15, 1968 would be an effective constitutional bar to the subsequent trial and re-sentence of August29, 1968 which resulted in the Opinion of October 20, 1969. The filing of the required Certificate of Contempt is both jurisdictional and substantial as compared to form or procedure. Therefore, the Court, not having complied with the necessity of filing the Certificate, and the subsequent sustaining of Petitioner's Appeal on that ground , seems to constitute former jeopardy. The matter is distinguished from that of a reversal on grounds of error in the admissability of evidence, etc. which results in the granting of a new trial. The Maine Court held that the sustaining of the Appeal of August 15, 1968 did not constitute former jeopardy.

C. EXCESSIVE FINE AND PUNISHMENT: In this instance, the punishment imposed is disproportionate to the alleged offence. Therefore the penalty violates Petitioner's rights protected by the EIGHTH (8th) AMENDMENT to the Constitution of the United States against excessive fines and cruel and unusual punishments. The Maine Court held the penalty to be proper.

III The Petitioner is not guilty of a contempt on the Record presented:

A. SUFFICIENCY OF EVIDENCE: The evidence against the Petitioner is inadequate to support a judgment of contempt.

B. AGGRESSIVE ADVOCACY: Under the particular circumstances of the case, the remark of the Petitioner relating to the prejudice of the Presiding Justice is excusable. Under the pressures of a hectic jury trial an aggressive advocate may " lose his h head" and say things not entirely proper, but also not consciously contemptuous. The public interest is best served by an independent bench and bar.

POINTS AT WHICH FEDERAL QUESTIONS WERE RAISED AND RULINGS THEREON

The federal questions presented here for consideration of this Court were raised at two points in the Courts of first instance.

In the Habeas Corpus proceeding, Case # 326, the points were raised by argument and trial brief. Also the points were raised in the Designation and Amended Designation of Points on Appeal which appears at RECORD-DOCUMENT # 4, pages

The trial Court rejected the arguments thereon. The Supreme Judicial Court concurred in the due process requirement of the filing of the Certificate of Contempt and sustained the Appeal. This is contained in the Opinion dated August 15, 1968 and is APPENDIX # 1.

After the re-sentencing on August 29, 1968, Petitioner filed Motion for New Trial and Judgment of Acquittal assigning the federal questions as the basis therefor. The

offended Justice dismissed both Motions. The Motions and ruling thereon appear at RECORD-DOCUMENT # 6, Pages 21 through 26.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Judicial Court of Maine.

Respectfully submitted,

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January 12, 1970

Date Opinion Filed
August 15, 1968

Reporter of Decisions
Docket No. 427
Law Docket No. 326

GROVER G. ALEXANDER

vs

CHARLES SHARPE, SHERIFF

WEATHERBEE, J.

On appeal from the dismissal of the writ of habeas corpus.

On July 6, 1967, the petitioner, an attorney-at-law, was acting as attorney for the plaintiff in the trial of a civil action for negligence before a jury in the Cumberland County Superior Court. At about 4:45 P.M. on that afternoon, the second day of the trial, the petitioner responded to a ruling of the Presiding Justice with the words "I think it demonstrates your prejudice without doubt." These words, addressed to the Justice, were spoken during trial and in the presence of the jury. The Justice answered that the matter would be discussed in chambers, adjourned court until morning without further comment, and left the building. The following morning he discussed the matter in chambers with counsel and granted petitioner's request that a mistrial be ordered in the case, and then, in the courtroom, adjudged the petitioner to have been in contempt and sentenced the petitioner to serve five days in the county jail and to pay a fine of five hundred dollars.

The petitioner took no appeal from the judgment of contempt against him but requested that execution of the sentence should be delayed until five o'clock that afternoon because of reasons concerning his family. The Justice

granted his request. At five o'clock the petitioner surrendered himself to the Sheriff and, at the same time, filed a petition for the writ of habeas corpus. The writ issued and hearing was had before a Justice of this Court. The writ was ordered dismissed, petitioner furnished bail, and the matter comes before us on petitioner's appeal from the dismissal of the writ of habeas corpus.

Until the adoption of our Maine Rules of Criminal Procedure in 1965, neither our statutes nor our rules provided for appeal from judgments for contempt. Review by habeas corpus has been accepted, there having been no other method available and, in Stern v. Chandler, 153 Me. 62, 134 A. 2d 550 (1957), this remedy was expanded to include review of the facts as well as of jurisdiction and form of commitment. M. R. Crim. P., Rule 37 now provides that whenever a judgment of the Superior Court is by law reviewable by the Law Court, review shall be by appeal. Appeal, and not habeas corpus, is now the appropriate method for review of Superior Court judgments for criminal contempt. Glassman, Maine Practice, 42.5. As the petitioner here took no appeal from the judgment of contempt against him, the matter is not properly before us. However, as this case is the first of its kind to reach this Court since the adoption of the new Rules we have treated the matter as though the correct procedure had been followed.

Petitioner designated some twenty-five points to be relied upon on appeal. Our disposition of the matter will make discussion of most of them unnecessary.

JURISDICTION

Petitioner contends that while the Court had undisputed jurisdiction over the subject matter and over his person, it lost this jurisdiction when it failed to take action against petitioner until the morning following the incident in question.

It has long been recognized that the power of a court to punish summarily for a contempt committed in the presence of the Court is inherent in the nature and constitution of a court and necessary for the court to possess in the exercise of all its other powers. Ex Parte Terry, 128 U.S. 289 (1888). Authority for the exercise of this power by the Superior Court is also found in 4 M. R. S. A., Section 114, and in M. R. Crim. P. Rule 42 (a) but this statute and rule only restate what substantially has been the common law.

Unquestionably the alleged contempt here was of the type classified as a criminal contempt, as distinguished from a civil contempt. Godard v. Babson-Dow Mfg. Co., 319 Mass. 345, 65 N. E. 2d 555 (1946). This Court has long recognized this distinction and has said that this class of contempts should be punished "summarily" (Androspoggin R. R. Co., 49 Me. 392 at 400 (1862)) and "by immediate punishment". (Stern, supra p. 68, 134 A. 2d 553, quoting Ex Parte Terry, supra.)

We do not view the use of the words "summarily" and "immediate" as precluding the Justice's use of reasonable time for deliberation and consideration before he takes such severe action. Summary action, as used in reference to criminal contempt, means without the necessity of notice and hearing

committed in the immediate view or presence of the Court. M. R. Crim. P. Rule 42 (b).

> "We think delay was not only proper, but laudable on the part of the trial judge. The word 'summarily' in the rule does not require a hasty determination." In re Osborne, 344 F. 2d 611 (1965).

The record shows that the Justice was greatly disturbed by the petitioner's conduct and its possible effect upon the trial of the case. The delay over night while the Justice reflected upon the matter and determined what course of action the circumstances required him to take was proper and commendable and the Court lost jurisdiction over neither the cause nor the petitioner by its deliberate action. People v. De Stefano, 64 Ill. App. 2d 368, 212 N. E. 2d 368 (1965); Hallinen v. United States, C. A. Cal. 182 F. 2d 880 (1950); United States v. Galante, 298 Fed. 2d 72, 100 A. L. R. 2d 431 (1962); Sacher v. United States, 343 U. S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952).

DUE PROCESS - SUFFICIENCY OF FACTS

The petitioner contends that the facts disclosed by the record are not sufficient to constitute a contempt.

Petitioner's client, the plaintiff in the case of Doughty v. Anderson, sought recovery for personal injuries. Early in the testimony of plaintiff's first witness on the morning of July 6th, the Presiding Justice, on objection by defense counsel, ruled that he would exclude any testimony relating to

memorandum, prepared by counsel, had contained no claim by plaintiff for permanent impairment. The Court and counsel then went into chambers where the petitioner vigorously opposed the Justice's ruling and under the Court's direction a record of the parties' positions was carefully prepared for their use if the issue should be raised upon appeal.

Following this, the Court offered the petitioner an opportunity to discontinue the trial and amend the pre-trial order to permit the disputed issue to be considered at a later trial. Petitioner declined this offer.

If the petitioner believed that the Justice's ruling was in error (and we do not suggest that it was in error,) it was still his ethical duty as an officer of the Court to abide by the ruling during the trial and then, if the jury verdict required it, to exercise his well protected right to review the issue on appeal. No other conduct is consistent with fair and orderly trial procedure and with respect for the rights of the opposing party. Instead, petitioner persisted in a line of questioning designed to establish in the jurors' minds the impression that plaintiff had suffered permanent impairment. Several rulings adverse to petitioner resulted. Finally, after a ruling adverse to petitioner on another issue the petitioner announced that he would now take advantage of the offer to discontinue the trial which the Justice had made that morning. The Justice refused to allow petitioner that earlier declined privilege and the petitioner, in the presence of the jury, accused the Justice of prejudice.

Petitioner's accusation of prejudice was clearly an act of contempt of court. Its immediate and obvious results were to disrupt the trial, to

dispassionate determination of the issues before them, and to deprive both plaintiff and defendant of an early resolution of their litigation. A more extended harm to be expected from such an accusation on the part of an officer of the court is a lessening of public respect for the bench, the bar and the judicial process.

The decree of the Justice below dismissing the writ of habeas corpus fairly and succinctly described the necessity of respect for the Court on the part of counsel.

> "A Judge is a representative of the judicial system and as such must be accorded, while functioning in a courtroom, the respect which his position demands. The responsibility of a properly conducted case rests on the shoulders of the Judge who has the duty of so conducting the trial of the controversy that the solemnity and decorum of a courtroom is maintained at its highest level. Party litigants are entitled to a well ordered trial of their causes, the public expect it and they are entitled to it. Trials are open to the public and what transpires in the courtroom is of public notice and concern. The jury, counsel, litigants, witnesses, court officers, representatives of the press and spectators are all observers of courtroom proceedings. They hear and see trial action and carry a message to the public as to what might be expected by any litigant who seeks judgment in a court of law. The message they carry is dependent upon a Judge's supervision in conducting a trial and counsel's conduct including his respect for and civility to a Court. A member of the legal profession, above all others, should be sensitive to the respect a Judge is entitled to while performing his duties in a court of law and conducting himself accordingly."

Petitioner asks us, in his brief,

> "What is an attorney to do under trial conditions when he is confronted with a series of what he believes to be erroneous and prejudicial rulings from the Court?"

The United States Supreme Court has answered this question in

Sacher v. United States, supra at p. 343 U. S. 9, 96 L. Ed. 723.

cited by petitioner, saying that if the Court's ruling is adverse,

> ". . . [I]t is not counsel's right to resist it or to insult the judge — his right is only respectfully to preserve his point for appeal."

RIGHT TO JURY TRIAL

Following publication of the decisions of the United States Supreme Court in Duncan v. Louisiana, _____U.S._____, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), and Bloom v. Illinois, _____U.S._____, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968), which were decided on May 20, 1968, petitioner was given leave to add to his Points on Appeal the contention that it was his constitutional right to have the issue of his contempt determined by jury trial.

Although the Court later in De Stefano v. Woods, _____U.S._____, 88 S. Ct._____, 20 L. Ed. 2d 1308 (1968) held that the constitutional principles announced in Duncan and Bloom were not applicable to trials commenced before May 20, 1968, thus excluding petitioner's conviction from their holdings, we have considered the effect of Duncan and Bloom upon contempt convictions in Maine courts.

The inherent authority of the Court to protect its decorum and integrity by punishing for all contempts without trial by jury has always been accepted in this State. Until recently this view prevailed in the federal system also.

> "It has always been the law of the land, both state and federal, that the courts — except where specifically precluded by statute — have the power to proceed summarily in contempt matters." United States v. Barnett, 376 U.S. 681, at 692,

In 1966 in Cheff v. Schnackenberg, 384 U.S. 373, 86 S. Ct. 1523, 16 L. Ed. 2d 629 (1966), the Court found constitutionally permissible a summary conviction for contempt without jury trial in a federal court in which a sentence of six months was imposed, finding this to be a "petty" offense. Under federal statutes and decisions misdemeanors, the penalties for which do not exceed six months, are petty offenses and do not require jury trials. The Court, in the exercise of its supervisory power, then ruled that in federal courts sentences exceeding six months in length may not be imposed for criminal contempt, without jury trial or waiver.

Duncan and Bloom do not support the petitioner's position here. In Duncan the Court held that the Fourteenth Amendment guarantees the right of jury trial in all state cases in which, if they were tried in a federal court, jury trials would be required by the Sixth Amendment. The Court observed that under Louisiana statutes simple battery is punishable by imprisonment up to two years and is thus not a petty offense but a serious crime entitling petitioner to a jury trial. The Court said:

> "It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses, . . . But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment."

In Bloom the Court repeated that the guarantees of jury trial found in Article III and the Sixth Amendment do not apply to petty offenses and that

> ". . . criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved."

The Court went on to say that where, as in Illinois, the legislature has not expressed a judgment as to the seriousness of an offense by fixing its maximum penalty, the Court would look at the actual penalty to determine the seriousness of the offense. It then found that the sentence of two years imprisonment imposed upon Bloom compelled the classification of his offense as a serious one. We have no statutory maximum penalty for criminal contempt in Maine. Neither Duncan nor Bloom fixed the exact line between petty and serious offenses but we find no suggestion in either opinion that the imposition of such a penalty as petitioner received here would require jury trial for criminal contempt.

REGULARITY OR PROCEEDINGS - DISQUALIFICATION OF OFFENDED JUSTICE

Petitioner relies on M. R. Crim. P. Rule 42 (b) which reads in part:

> "A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. . . . The person charged is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a justice, that justice is disqualified from presiding at the trial or hearing except with the defendant's consent. . . ."

Rule 42 (b) expressly excepts from this requirement the action of a justice for contempts occurring in the justice's presence. Neither our Rule 42 (a) nor the Federal Rule from which ours was adopted disqualifies the Presiding Justice from dealing with contempts committed in open court in

offending the orderliness of the proceedings, also inpugns the integrity of the Justice. The need for summary action plus the advantage of the presiding justice's first hand observation of the offending actions and their background must be balanced against the danger that personal resentment may enter into the Justice's evaluation of the incident.

In Cooke v. United States, 267 U.S. 517, 45 S. Ct. 290, 69 L. Ed. 767 (1925) the United States Supreme Court, examining an occurrence involving a Rule 42 (a) contempt, announced its approval of procedure under which the offended justice requests that the matter be heard before another justice, although the language of the Rule does not provide for it. The Court said:

> "All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place."

In Offutt v. United States, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954), cited by the petitioner, the Court dealt with a 42 (a) contempt in which the presiding justice became involved personally to an unusual extent in bitter interchange of remarks with counsel.

> "The record discloses not a rare flare-up, not a show of evanscent irritation — a modicum of which temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner. There was an intermittently continuous wrangle on an unedifying level between the two."

Offutt presented the exceptional case. The Court concluded that the extent of that judge's personal involvement should preclude his sitting in judgment upon that petitioner's conduct and that there "the application of the rule pronounced in Cooke v. United States is called for." The Court made clear its appreciation of the importance of summary action in in-court contempt proceedings and its appropriateness in all but unusual instances, saying:

> "We do not mean to imprison the discretion of judges within rigid mechanical rules. The nature of the problem excludes it."

Although our Rule 42 (a) does not require an offended justice to refer an alleged in-court contempt to another justice for hearing, we agree with the wisdom of the Cooke rule that he may do so. 17 Am. Jur. 2d, Contempt, Sec. 85. Our examination of the record in Doughty v. Anderson convinces us that the facts in the present case did not compel such a reference.

DUE PROCESS - REGULARITY OF PROCEEDINGS - ALLOCUTION

In the courtroom on the morning of July 7th the Presiding Justice ordered a mistrial in the case of Doughty v. Anderson and explained to the jurors his reason for doing so. He then addressed the petitioner stating his reasons for concluding that the petitioner's conduct was contemptuous and could not go unpunished.

Petitioner calls our attention to M. R. Crim. P. Rule 32 (a) which reads, in part:

> ". . . Before imposing sentence the court shall address the defendant personally and ask him if he desires to be heard prior to the imposition of sentence. The defendant may be heard personally or by counsel or both. Failure of the court to so address the defendant shall not constitute grounds for relief under Rule 35 (b) of these rules, unless the defendant shows that he has been prejudiced thereby."

Although this matter must go back for re-sentence where he will doubtless be offered opportunity for allocution this issue merits brief discussion. While the type of offense of which the petitioner was adjudged to be guilty is classified as criminal contempt committed in the presence of the Court, it seems clear that not all the procedural rules relating to the ordinary criminal offense are applicable. It is an offense sui generis. Cheff v. Schnachenberg, supra. For example, there is no right to notice, a written charge, hearing, and to present witnesses. However, more desirable practice would permit allocution in open court before sentence.

We do not find that petitioner was prejudiced. Counsel met with the Justice in chambers before going into Court the morning of July 7th. There petitioner urged upon the Court that a mistrial should be ordered to protect his client from the effects of his conduct. He said, during their discussion:

> "I am responsible for it, there is no question about that. You may deal with me any way you should, I'm willing to accept it but I don't think my client should be penalized."
>
> *****
>
> "I regret that incident yesterday and again I say I'm willing to accept whatever you feel I deserve."
>
> *****
>
> "I don't feel instructions from the Court could correct the animosity that they [the jurors] must feel toward me."
>
> *****
>
> "I regret having said that."

This discussion between counsel and Court in chambers was an extended one. In our view the petitioner was fully heard in chambers, on the record, and there was no requirement that he be heard again in the courtroom. He had in effect acknowledged the contempt and expressed his regrets and he had indicated that he was willing to accept whatever punishment the Court felt it should give. Immediately after sentence petitioner was given an opportunity to speak and he did so at length acknowledging his bad conduct and offering his apologies to both the jury and the Court. Petitioner then requested permission to speak to the Court in chambers and there sought unsuccessfully to purge himself of the confinement part of the sentence. In our view the petitioner had adequate opportunity to be heard and was not prejudiced.

Petitioner also argues that the Presiding Justice's remarks in chambers following sentence demonstrates that he was prejudiced and that he considered matters not of his personal knowledge in arriving at his judgment of contempt.

> "MR. ALEXANDER: Judge, I openly ask you if there is any way I can perhaps purge myself of this confinement? It obviously will work its hardship in terms of, you know, my practice and that sort of thing.
>
> "THE COURT: I'm afraid not, Grover. I am not very proud of myself for what I have done and it's the most difficult thing I have had to do in my life. I have made up my mind this is the only way I could bring to your attention what I think you have done. We have had some experience before but I have never had occasion to get upset. But I'm not the only one, and without attempting to justify anything I just say to you that your reputation with all of the judges, or most of the judges in this particular area makes this no particular surprise. I mean, I think you have had it coming.

"MR. ALEXANDER: You really do.

"THE COURT: If you didn't have it coming I wouldn't have done it to you."

The accusation which the petitioner made in open court was clearly contemptuous and we see nothing in the quoted remarks which suggests to us that the Justice found it so because he was already prejudiced against the petitioner.

ABSENCE OF MITTIMUS

At the time the petitioner surrendered himself to the Sheriff on the afternoon of July 7th there was not in existence any written order of commitment or mittimus and none was prepared by the committing Justice until after petitioner had been released on bail pending his hearing on habeas corpus. Petitioner takes nothing by this point. There was no loss of jurisdiction by the Court. The record shows the Judge orally ordered the commitment and the order was correctly carried out.

> "It is the judgment of the Court which authorizes detention, The mittimus is the evidence of the officer's authority. . . . The judgment is the real thing, the precept is not. The important question on habeas corpus is, is the prisoner in the custody where the judgment commanded him to be put, and not how he was taken into custody." Wallace v. White, 115 Me. 513, 521, 99 A. 452 (1916). See also Stern v. Chandler, supra.

DUE PROCESS - RULE 42 (a)

Petitioner asserts that he has been denied due process of law because of the failure of the committing court to comply with what petitioner

argues is required procedure.

M. R. Crim. P., Rule 42 (a), provides:

> "(a) Summary Disposition. A criminal contempt may be punished summarily if the justice certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the justice and entered of record."

Section (b) states that all other contempts shall be determined only after notice and hearing. The Justice in this case made no certificate as such. He prepared an order reciting that the petitioner had "been adjudged in contempt of this court by his conduct in open court in the presence of this Court and Jury", stating the punishment which had been verbally imposed and ordering petitioner's commitment to the custody of the Sheriff.

The purpose of Rule 42 (a) is to present to a reviewing court a full and clear statement of the facts out of which the contempt arose so that that court may determine whether the action of the committing court was within its jurisdiction and whether its action was just or arbitrary. People v. Longhram, 2 Ill. 2d 258, 118 N.E. 2d 310 (1954); In re: Rotwein, 291 N.Y. 116, 51 N.E. 2d 669 (1943); People v. Tavernier, 384 Ill. 388, 51 N.E. 2d 528 (1943); Widger v. United States, 244 F. 2d 103 (1957). Here the order of the Presiding Justice states his conclusion but not the facts upon which his conclusion was based.

Although the record in this case includes the transcript of the entire proceedings in Doughty v. Anderson, in the trial of which case petitioner made the accusation of prejudice, which we have considered and found to

be contemptuous, together with the discussion between counsel and the Court in chambers and the proceedings in the courtroom during which petitioner was adjudged to be in contempt and was sentenced, we can only infer that this accusation was the basis – and the only basis – of the judgment of the Presiding Justice.

We believe that due process necessitates a filing of the certificate referred to in Rule 42 (a). The certificate need not be filed immediately, nor before sentence in every case, but only the filing of the certificate can establish a record of what facts the Justice found to be contemptuous and the basis for the sentence imposed.

We conclude that the matter must go back to the Superior Court where the same Justice shall file the required certificate and re-sentence petitioner.

Appeal sustained. Case ordered remanded to the Superior Court for Cumberland County where the Justice shall file the certificate provided for in M. R. Crim. P. Rule 42 (a), and, upon notice to petitioner, shall have him brought before the same Justice in that Court for sentence.

Tapley, J. - did not sit.

Dufresne, J. - did not sit.

Date Opinion Filed
October 17, 1969

Reporter of Decisions
Docket No. 531
Law Docket No. 356

STATE OF MAINE

vs.

GROVER G. ALEXANDER

DUFRESNE, J.

On July 7, 1967 Grover G. Alexander, an attorney-at law, was summarily adjudged guilty of criminal contempt for disrespectful, defiant and insolent conduct in the course of a civil trial in which he represented the plaintiff. He was sentenced to imprisonment in the county jail for the term of 5 days and ordered to pay a fine of $500. Surrendering himself to the Sheriff, Alexander at the same time filed a petition for the writ of habeas corpus before a Justice of this Court who issued the writ and ordered a hearing thereon. From the subsequent dismissal of the writ, an appeal was taken to this Court. Alexander v. Sharpe, 1968, Me., 245 A.2d 279. Although the appellant had erroneously sought appellate relief from the contempt proceedings through habeas corpus and could have been summarily refused consideration for such error, this Court nevertheless proceeded to grant the requested review, treating the case as though the appellant had properly appealed from the con-

Our Court, in its opinion, affirmed the lower court's finding of guilt as it stated at page 283 thereof that "[p]etitioner's accusation of prejudice [against the presiding justice] was clearly an act of contempt of court." However, due to the lower court's failure to comply with the requirements of Rule 42 (a), M.R.Crim.P., the appeal was sustained and the case was ordered remanded to the Superior Court for Cumberland County "where the Justice below shall file the certificate provided for in M.R.Crim.P. Rule 42 (a), and, upon notice to petitioner, shall have him brought before the same Justice in that Court for sentence."

In compliance with the mandate, the justice below filed the following certificate on August 29, 1968;

"STATE OF MAINE

Cumberland, ss Superior Court

In Re: Grover G. Alexander
Defendant in Contempt

I hereby certify that I was the Presiding Justice at a Term of our Superior Court begun and held at Portland, within and for the County of Cumberland on the first Tuesday of June A.D. 1967, and that on July 6, 1967, at a session of said Court, during the trial of the civil actions of Edison A. Doughty, Jr. and Edison A. Doughty, Sr. vs. Oscar L. Anderson, civil docket numbers 67-230 and 67-231, at a time in the examination of the witness Richard L. Johnson, in open Court, in the presence of the Court and the Jury hearing the case, Grover G. Alexander, Esq., counsel for the Plaintiffs, made the following statements and conducted himself in the following manner, to wit:

He accused the Presiding Justice of being prej-

> Almost immediately before making the above statement, at a time when the Presiding Justice was speaking and admonishing Plaintiffs' counsel to be orderly, the said Grover G. Alexander, Esq., standing directly before the bench, continued to speak in a tone of voice and manner both rude and disrespectful, and belligerently shook his finger at the Court while continuing to address the Court, refusing to heed the Court's admonition.
>
> I do further certify that the foregoing conduct and language of Grover G. Alexander, Esq. was committed in open Court, in the presence of the Presiding Justice and that it was seen and heard by me as such Presiding Justice, and was also seen and heard by the Jury selected to serve as jurors in the cases and sitting in the jury box.
>
> And I do further certify that on July 7, 1967, I found the said Grover G. Alexander, Esq. guilty of contempt of Court on the basis of the language and conduct of the said Grover G. Alexander, Esq. as specifically set forth above, which language and conduct I found contemptuous of the Court, degrading to the administration of justice and disrupting to the orderly procedure of the Court.
>
> Dated at Portland, Maine this twenty-ninth day of August 1968.
>
> /s/ [Presiding Justice]
> Justice, Superior Court "

Pursuant to the suggestion of this Court at page 286 of its opinion, the appellant was offered before resentence opportunity for allocution, a right which he fully exercised. The presiding justice again condemned Alexander to imprisonment in the county jail for the term of 5 days and in addition thereto to pay a fine of $500. An appeal to this Court was filed forthwith and execution of the sentence was stayed pending its determination. Prior

to perfection of his appeal appellant on September 6, 1968 made a motion before the justice below for a judgment of acquittal and, in the alternative, for a new trial on the grounds that his constitutional rights of due process and to jury trial had been violated, points of grievances which he had fully developed in his previous appeal and which have been decided against him by this Court. Alexander v. Sharpe, supra. These motions were dismissed by the presiding justice for want of jurisdiction. The appellant renews in his points on appeal all these previously considered grievances of alleged constitutional dimension underlying his motion for acquittal or for new trial, and in addition thereto claims error below for the following reasons:

> "9. The present conviction and sentence is barred by reason that the appellant has been formerly placed in jeopardy for the same alleged offense."
>
> "12. The inclusion in the present record of a certificate wherein conduct on the part of the appellant is alleged outside of the reported record, and the denial of the right of appellant to produce contrary evidence by way of a new trial or otherwise deprives appellant of due process as provided by the State and Federal Constitutions as hereinbefore set forth."
>
> "13. The Court erred in dismissing Appellant's Motions for acquittal, New Trial and otherwise."
>
> "14. The punishment is harsh and excessive and is prohibited by State and Federal Constitutions."

The remand from this Court was clear and unambiguous; it con-

v. Sharpe, supra, indicated this Court's single concern which arose from the lower court's non-compliance with the requirements of Rule 42 (a), M.R.Crim.P. We pointed out that without the justice's certificate we could only infer that the proffered accusation of prejudice against the presiding justice exemplified in the record on appeal was the basis -and the only basis- of the judgment and sentence. Our mandate to the Superior Court permitted it to resume jurisdiction of the case but with specific instructions limiting its action therein to the filing of the required certificate and the resentence of the appellant. We may assert anew that "[t]he purpose of Rule 42 (a) is to present to a reviewing court a full and clear statement of the facts out of which the contempt arose so that that court may determine whether the action of the committing court was within its jurisdiction and whether its action was just or arbitrary." Alexander v. Sharpe, supra, at page 288. This Court concluded that a person's right of appeal from a conviction of contempt in summary proceedings necessitates as a matter of due process that all the essential facts supporting the finding of guilt be extended in written certificate as required by Rule 42 (a), M.R.Crim.P., so that appellate review of the lower court action may be meaningful. Conviction should not rest on presumptions or inferences, nor on facts which did not occur in the presence of the court. The remand for the filing of the certificate and for resentence did not set aside the lower court's adjudication of

appellant's guilt of contempt. This Court has the power and authority to open the penalty aspect of the judgment without affecting the finality of the adjudication of guilt. The presiding justice has now strictly complied with the plain terms of this Court's mandate. He could not vary it, nor examine it for any other purpose than its execution. He could not give the appellant any other or further relief. Sibbald v. United States, 1838, 12 Peters 488, 9 L.Ed. 1167. Our Court has so stated the rule in civil cases. See, Whitney v. Johnston, 1904, 99 Me. 220, 58 A. 1027; Simpson v. Richmond Worsted Spinning Co., 1929, 128 Me. 344, 147 A. 426. A like rule is applicable in criminal cases. United States v. Howe, 1922, 2d Cir., 280 F. 815. See, State v. Cole, 1923, 123 Me. 340, 122 A. 871; In re Hume, 132 Me. 102, 167 A. 79.

This Court's mandate finally ended the case so far as the adjudication of guilt was concerned and the lower court's jurisdiction was limited to the specific stated purposes expressed in the remanding order. Where from its terms no intent can be discerned on the part of this Court to vacate the lower court's adjudication of guilt of contempt to permit a new finding in the light of the filing of the certificate, the scope of the instant appeal from the judgment of resentence must be limited to matters arising in connection with the second sentencing and the appellant's motion for acquittal or, in the alternative, for a new trial was not jurisdic-

United States, 1936, 8th Cir., 86 F.2d 79.

Appellant objects to the lower court's description in the certificate of counsel's conduct outside of the printed record on appeal which, he says, influenced the presiding justice in meting out the particular sentence which he gave him. This objection is without merit. The purpose of the certificate under Rule 42 (a), M.R.Crim.P., is precisely to get as full a picture as words can portray of the contemptuous conduct. The stenographic record will not pick up such elements of in-court misbehavior as rude and disrespectful tone of voice or manner of address, nor the shaking of one's finger at the court in a belligerent way. The complete depiction of the court-room scene must be left to the justice's ability to reflect the same in his certificate and its reliability must be placed on his fairness and objectivity. The appellant has no more right to controvert the truth of that phase of the recited facts in the present posture of the case than he did at the time of the adjudication of his guilt which led to his first appeal. Stern, Pet'r. v. Chandler, 1957, 153 Me. 62, 71, 134 A.2d 550, 555. Furthermore, the presiding justice had the right to take the whole occurrence including counsel's vocal and gesticulative insolent demeanor into consideration when inflicting punishment and a full description of the entire scene in the certificate was necessary for a proper appellate evaluation of the sentence.

of his constitutional rights. He first claims that the resentencing violated the double jeopardy clause of Article I, § 8 of the Constitution of Maine, which provides that "[n]o person, for the same offence, shall be twice put in jeopardy of life or limb."

Our Court has ruled that a defendant, after a mistrial is ordered upon his motion or with his consent, can be tried anew upon the same charge and sentenced thereon and that a claim of constitutional double jeopardy does not lie to avoid the same. Clukey v. State of Maine, 1964, 160 Me. 198, 202 A.2d 6. In the instant case, the appellant instituted habeas corpus proceedings, considered by this Court in the nature of an appeal from the judgment of conviction of criminal contempt and from the sentence imposed thereon. The reversal of appellant's first sentence at his request on the ground of non-compliance by the court with the requirements of Rule 42 (a), M.R.Crim.P., is no bar to resentencing upon any claim of constitutional prohibition against double jeopardy.

It is the general rule that the resentencing of a prisoner duly convicted of crime, who has obtained his discharge from the sentence either on direct appeal or in habeas corpus proceedings, is not subject to the objection that he is put in jeopardy twice for the same offense. 22 C.J.S., Criminal Law, § 273, p. 706, § 267, p. 687; 21 Am. Jur.2d, Criminal Law, §§ 209, 210 ; Allen v. State, 1954, 260 Ala. 324, 70 So.2d 644; Northcott v. Hand, 1960,

Alexander's last objection raises the propriety of his sentence to imprisonment in the county jail for 5 days and to pay a fine of $500. He contends that such punishment under the recorded circumstances of the instant case was excessive and in violation of the constitutional prohibitions against cruel or unusual punishment. Constitution of Maine, Art. I, § 9; Constitution of the United States, Amendment VIII.

Punishment for criminal contempt is within the sound discretion of the sentencing court and in the absence of an abuse thereof it cannot be disturbed on appeal. Keyes v. United States, 1963, 9th Cir., 314 F.2d 123.

It is a precept of fundamental criminal justice that punishment for crime should be graduated and proportioned to the offense committed. Weems v. United States, 1909, 217 U.S. 349, 367. In contempt the penalty imposed should bear some reasonable relation to the nature and gravity of the contumacious conduct. United States v. Conole, 1966, 3rd Cir., 365 F.2d 306, cert. den. 87 S.Ct. 743, 385 U.S. 1025, 17 L.Ed.2d 673. The seriousness of the consequences of the contemptuous behavior, the public interest in supporting judicial power to maintain order and decorum in the courts of justice and adequate deterrence of future defiance of judicial authority by the appellant and others are all matters for the sentencing judge to take into consideration in his exercise of a sound

that the sentence under appeal was well within permissible limits of sound judicial discretion and dispels any possible claim of abuse.

The appellant's conduct in open court before the jury was well beyond the concept of mere overzealousness in legal advocacy. The court-room scene as reproduced by the record and the justice's certificate reveals a deliberate and blatant disrespect for the court strategically designed to delude the jury into the erroneous impression that the court was prejudiced against counsel and his client so as to create sympathy for his cause. Such reprehensible conduct necessitated the declaration of a mistrial in the immediate case and resulted in undue expense to the public treasury. The reference sanction, consisting of imprisonment in the county jail for a term of 5 days and payment of a fine in the amount of $500 and imposed upon an officer of the court for conduct of great demoralizing effect on the authority of the court before the jury and the public, does not denote such punitive severity as to shock our respective or collective consciences and by no means constitutes the infliction of cruel and unusual punishment or the imposition of excessive fine within the constitutional prohibition of either the State or Federal Constitution. In re Osborne, 1965, 9th Cir., 344 F.2d 611 (10 days); United States v. Schiffer, 1965, 6th Cir., 351 F.2d 91 (60 days).

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, A.D. 1970, copies of the Petition for the Writ of Certiorari was mailed, postage prepaid,

to: JOHN W. BENOIT
ASSISTANT ATTORNEY GENERAL
STATE HOUSE
AUGUSTA, MAINE
Counsel for Respondents

I further certify that all parties required to be served, have been served.

William A. Mann
308 Colorado Building
Washington, D.C.
Counsel for Petitioner

January 15th, 1970

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1969
No. 1079 [redacted]

GROVER G. ALEXANDER
Petitioner

v.

CHARLES SHARPE
Respondent

STATE OF MAINE
Respondent

v.

GROVER G. ALEXANDER
Petitioner

BRIEF IN OPPOSITION

JOHN W. BENOIT, JR., Esquire
Deputy Attorney General
State House, Augusta, Maine
Counsel for Respondent

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BRIEF IN OPPOSITION

OPINIONS BELOW

The two opinions below that are made the subject of the Petition have been reported for some time in 257 A.2d 778 (October 17, 1969) and 245 A.2d 279 (August 15, 1968).

JURISDICTION

An examination of the Petition clearly indicates that it fails to confer jurisdiction on the Court. Note that the cover of the Petition captions two cases; and that those two cases are printed in the Appendix to the Petition. The "Statement of the Case" and the "Reasons for Granting Writ" contain references to both those opinions; the latter section of the Petition being devoted entirely to the first opinion dated August 15, 1968. Although the Petition prays for review of an opinion below dated October, 1969, the remaining parts of the Petition are devoted to an exposition converning the August, 1968 opinion. Petitioner does this for good reason; it is the August,

1968 opinion which decides the points contested by Petitioner; not the October, 1969 opinion. If that were not so, the Petitioner would have concluded his "Reasons for Granting Writ" by a reference to the October, 1969 opinion; but he did not do so.

Petitioner seeks review of the August, 1968 opinion sans compliance with Rule 22(1) of this Court. 28 U.S.C. § 2101(d). The time for filing a Petition concerning that opinion has long since expired.

QUESTIONS PRESENTED

Although Petitioner has framed several questions for the Court's attention, Respondent submits the following three questions for consideration:

1. Should a Petition be granted which is out of time?

2. Should a Petition which misstates material facts be granted?

3. Should a Petition be granted without reason?

STATEMENT OF THE CASE

The Petitioner misstates material facts. Petitioner admits making a charge against the Trial Judge in the presence of the jury, that: "I think it demonstrates your prejudice without doubt"; but Petitioner claims the remark followed " * * * an exchange between Court and Counsel wherein the Court shouted at Petitioner, accused him of being incompetent, and otherwise caused the Petitioner great embarrassment in the presence of the jury. * * * " (Petition, p. 4) There is no basis for Petitioner's claim in the Record; and he admits as much: "Unfortunately, the precise language of the Court and Petitioner was not recorded by the Reporter." (Id., p. 5)

Does Petitioner have a right to misstate facts? Continuing, Petitioner next claims that the exchange between the Court and counsel " * * * began after an incorrect ruling by the Court adverse to the Petitioner * * * ." (Ibid.) Again, where does the Record state that the ruling has been declared incorrect? Such self-serving remarks are most misleading. Finally, Petitioner concludes his "Statement of the Case" with a denial that he pointed his finger at the judge during his charge of prejudice: " * * * Petitioner was at all times pointing and referring to the chalkboard * * * ." (Id., p. 7) Where does that appear in in the Record? One wonders why Petitioner felt compelled to make these self-serving statements as a basis for the Writ.

The facts of the case should be stated sans distortion. On July 6, 1967, Petitioner was counsel in a tort case being tried before a jury. At approximately 4:45 p.m., Petitioner made a remark following a ruling by the judge: "I think it demonstrates your prejudice without doubt." (Trial Transcript, p. 152) Court was then adjourned until the next day; when the matter was discussed in chambers. Court convened and both the judge and the attorney made comments before the jury about the matter. A request for a mistrial was granted. Petitioner was adjudged to have committed a contempt; and he was sentenced to 5 days in jail and to pay a fine of $500. It is that set of facts, briefly stated, that gives rise to the Petition.

ARGUMENT

I.

THE PETITION, BEING OUT OF TIME, SHOULD BE DISMISSED.

Rule 22(1) of this Court requires that a Petition for the Writ of Certiorari be filed within 90 days next following the date of the final judgment sought to be reviewed. (The case is not involved with an extension of that period.) The present Petition clearly indicates that it is grounded upon the August, 1968 opinion (Petition, p. 7-10); and we agree with the Petitioner that the August, 1968 opinion is the one which contains all the material made the subject of the "Reasons for Granting Writ". But that does not give Petitioner license to ignore Rule 22(1). Petitioner seeks to avoid a

dismissal by ringing in the October, 1969 opinion solely for that purpose; while ignoring it for any other purpose.

II.

SELF-SERVING MISSTATED MATTERS ARE NOT A BASIS FOR THE WRIT.

The "Reasons" for granting the Writ contain a recital that: " * * * the alleged contemptuous conduct involved a criticism of and an accusation of prejudice on the part of the Presiding Justice. * * * " (Petition, p. 8) That unsupported remark, noted in an earlier part of the Petition (Id., p. 4), seeks importance out of repetition. But why has the Petitioner chosen not to re-acknowledge the absence of Record support for his statement (Id., p. 5). Continuing, the "Reasons" advanced

by Petitioner state, inter alia, " * * * the Court apparently considered the remarks of the Petitioner after the alleged contempt, both in Court and in chambers, as evidence of guilt. * * * ." (Emphasis ours.) (Id., p. 8) Such a remark is pure surmise; and Respondent objects to it, and to the other misstatements noted, as a basis for the Writ.

III.

IN ANY EVENT, THE DECISIONS BELOW ARE CORRECT.

Respondent contends that even if the Petition is not dismissed for the aforesaid reasons, the opinions below are correct.

A. The Questioned Opinions of the Supreme Judicial Court are in Accord with Applicable Decisions of this Court.

Petitioner claims the trial court judge lost jurisiction to adjudge contempt the day following its occurrence; and that the judge's certificate was filed late. One federal court has decided that just such an overnight delay was not only proper, but laudable; and that the word "summarily" in the Federal Rules relating to punishment for contempt did not require

a hasty decision. In re Osborne, 344 F.2d 611 (9th Cir.). Other cases opposed to Petitioner's claim are: Hallinan v. United States, 182 F.2d 880; United States v. Gallante, 298 F.2d 72; and Sacher v. United States, 343 U.S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952). As for the alleged late filing of the certificate, it seems enough to note that the certificate was filed following remand of the matter from the Law Court with direction that the same be filed pursuant to Rule 42(a), Maine Rules of Criminal Procedure; a counterpart of the corresponding Federal Rule.

Language in the Petition leads to the conclusion that Petitioner is unsure about his challenge to the opinions below:

(1) That the State Court has decided substantial federal questions in a way " * * * probably not in accord with applicable decisions * * * " of this Court (Petition, p. 7); and (2) That the filing of the certificate following remand of the case " * * * seems to constitute former jeopardy." (Id., p. 9) (Emphasis supplied.) Petitioner's lack of certainty surfaces in his discussion of Gompers v. Bucks Stove Co., 221 U.S. 418. That case is distinguishable on facts. It has long been recognized that the power of a court to punish summarily for a contempt committed in its presence is inherent in the nature and constitution of the court. Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888).

The Petitioner's assertions to the contrary, the opinions below contain accurate applications of Federal cases to the contention that jury trial was a necessity. Duncan v. Louisiana, 391 U.S 145, 88 S. Ct. 1444, 20 L. Ed.2d 491 (1968); Bloom v. Illinois, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed.2d 522 (1968). Although DeStefano v. Woods, 392 U.S. 631, 88 S. Ct. 2093, 20 L.Ed.2d 1308 (1968) held that the constitutional principles announced in Duncan and Bloom were not applicable to cases commenced before May 20, 1968, thus excluding the instant case from their holdings, the "opinions below" considered the effect of Duncan and Bloom upon contempt actions in Maine courts. Alexander v. Sharpe, 245 A.2d 279, 284 (1968). Specifically,

the Law Court applied Cheff v. Schnackenberg, 384 U.S. 373, 86 S. Ct. 1523, 16 L. Ed.2d 629 (1966) wherein this Court "found constitutionally permissible a summary conviction for contempt without a jury trial in a federal court in which a sentence of six months was imposed, finding this to be a 'petty' offense." (Ibid.)

Petitioner's position to the contrary, the opinions below have not settled something new under the sun. (Petition, p. 9) Petitioner's comments on right of trial by jury are grounded on provisions of the State Constitution; there being no mention of the Federal Constitution. No federal question is raised. Instead, Petitioner seeks to apply a State Constitutional provision

relating to trial by jury to all criminal actions of every name and description. The Law Court has held that contempts of court committed in the court's presence may be summarily punished. Androscoggin & K. R. Co. v. Androscoggin R. Co., 49 Me. 392. But the Law Court is not unmindful of the decisions of this Court in this area. Alexander v. Sharpe, supra, p. 284.

Petitioner's remaining claims are headed 'former jeopardy' and 'excessive sentence'. Surely, no former jeopardy resulted from a remand of the matter with direction that a Rule 42(a) certificate be filed. As a general rule, a person may be resentenced following disposition of an appeal or habeas corpus without being put in jeopardy

twice for the same offense. 22 C.J.S., Criminal Law, §§ 209, 210, 267, 273. Allen v. State, 260 Ala. 324, 77 So.2d 44 and Northcott v. Hand, 186 Kan. 662, 352 P.2d 450. Next, it is difficult to perceive how the sentence was excessive. Punishment for criminal contempt is within the sound discretion of the sentencing court and, in the absence of abuse, cannot be disturbed on appeal. Keyes v. United States, 314 F.2d 123 (9th Cir.). The punishment must be in proportion to the offense committed. Weems v. United States, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793. Here, the sentence bears a reasonable relation to the nature and gravity of the contumacious conduct. United States v. Conole, 365 F.2d 306, cert. den. 385 U.S. 1025. Also see

In Re Osborne, supra, 10 day jail term upheld; and United States v. Schiffer, 351 F.2d 91, 60 days imprisonment sustained.

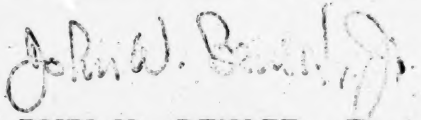
B. Petitioner Attempts to Relitigate the Facts of the Case as Basis for the Writ.

Petitioner believes the evidence is inadequate to support the judgment of contempt; and that what he did was merely "aggressive advocacy". (Petition, p. 10) Such self-serving remarks should not be the basis for the Writ. We need not, for example, inquire of the Petitioner as to his definition of contempt.

CONCLUSION

The Writ should not be granted this Petitioner because the Petition is out of time, is grounded on misstatements of fact, and the "opinions below" are correct.

Respectfully submitted,



JOHN W. BENOIT, Jr.
Deputy Attorney General

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of the Supreme Court of the United States, the undersigned, counsel of record for the Respondent, on the date written below, did deposit a copy of the above Brief in Opposition in the United States Post Office at Augusta, Maine, first class postage prepaid, addressed to petitioner's attorney as follows: William A. Mann, Esquire, 308 Colorado Building, Washington, D.C.

Dated:
January 28, 1970

John W. Benoit, Jr.

JOHN W. BENOIT, JR.
Deputy Attorney General
State House
Augusta, Maine

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1969

No. 1079, [redacted]

GROVER G. ALEXANDER
Petitioner

v.

CHARLES SHARPE
Respondent

STATE OF MAINE
Respondent

v.

GROVER G. ALEXANDER
Petitioner

SECOND BRIEF IN OPPOSITION
(RESPONSE TO PRINTED PETITION)

Counsel for Respondent:
JOHN W. BENOIT, JR.
Deputy Attorney General
State House, Augusta, Maine

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1969

No. 1079, [redacted].

GROVER G. ALEXANDER
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Respondent

STATE OF MAINE
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GROVER G. ALEXANDER
Petitioner

SECOND BRIEF IN OPPOSITION
(RESPONSE TO PRINTED PETITION)

Counsel for Respondent:
JOHN W. BENOIT, JR.
Deputy Attorney General
State House, Augusta, Maine

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1969

No. 1079, Misc.

GROVER G. ALEXANDER
Petitioner

v.

CHARLES SHARPE
Respondent

STATE OF MAINE
Respondent

v.

GROVER G. ALEXANDER
Petitioner

SECOND BRIEF IN OPPOSITION (RESPONSE TO PRINTED PETITION)

QUESTION

Will the Court allow the Petitioner to substitute a late printed petition for an earlier-filed "out-of-size"

petition if the printed petition contains new material, omissions and substituted matter not present in the "out-of-size" petition?

STATEMENT

I.

Respondent, having received Petitioner's "out-of-size" Petition on January 19, 1970 and being informed by the Clerk's Office that a later printed Petition would be substituted for the "out-of-size" Petition, had caused the Brief in Opposition to be prepared; which Brief is filed in this Court. That Brief responds to the "out-of-size" Petition, not to the later late printed Petition.

II.

Respondent moves that the printed Petition (received by Respondent on January 26, 1970), substituted for the "out-of-size" Petition filed on January 15, 1970 (at the close of the 90-day filing period), be dismissed because:

A. The printed Petition contains substantial new material not present in the "out-of-size" Petition, for which exchange was to be made, as follows (references are to the printed Petition):

1. Statement of the Case, second paragraph, p. 6, to second paragraph, p. 18, inclusive;

2. Statement of the Case, first paragraph, p. 20, to top of p. 23, inclusive;

3. Statement of the Case, first paragraph, p. 24;

4. Reasons for Granting Writ, top of page 26 to the second paragraph, p. 27;

5. Reasons for Granting Writ, last paragraph of "A.", p. 28 and last paragraph of "B", p. 29;

6. Points at which Federal Questions were Raised, Etc., p. 31, last five sentences of the last paragraph.

B. The printed Petition omits material which was present in the "out-of-size" Petition, for which exchange was to be made, as follows (references are to the out-of-size Petition);

1. Statement of the Case, last paragraph, p. 7.

C. The printed Petition deleted certain sentences in the "out-of-size" Petition; substituted new sentences and new language, as follows (references are to printed Petition):

1. Statement of the Case, first paragraph, p. 6, ". . . the Court stood up. . . and humiliation. . . "(new); second paragraph, "The exchange began after an incorrect ruling by the Court. . . " was replaced with, "The exchange began after what Petitioner felt to be a series of arbitrary and incorrect rulings. . . . "

2. Reasons for Granting Writ, p. 25, last paragraph, last sentence, " . . . including the dismissal of

the very motions in which these constitutional questions were sought to be raised." (New)

3. Reasons for Granting Writ, p. 28, paragraph A, omission of last sentence, i.e.,"the Maine Court held that Petitioner was not entitled to trial by jury" and substituted:"The disqualification is the distinguishing feature here." The same paragraph also recites new language ". . . together with Petitioner's claim of disqualification of the offended Justice, . . . "

4. Reasons for Granting Writ, p. 29, paragraph B., last sentence is omitted: "The Maine Court held that the sustaining of the Appeal

of August 15, 1968 did not constitute former jeopardy," and replaced with: "It seems more comparable to an acquittal based on a failure of proof as a matter of law, the absent Certificate and Order being the required proof."

ARGUMENT

The reference materials, new, omitted and substituted, change the presentation of this case such that:

A. "Substitution" of the printed Petition for the first Petition should not be allowed. The printed Petition, being a substantial departure from the

"out-of-size" Petition, stands alone outside the 90-day filing period.

B. If allowed, the printed Petition will work a violation of Rule 22(1) requiring the petitioner to file his Petition within a fixed period so that the respondent may, in reliance thereon, know those points to be answered.

C. Respondent, in good faith reliance on the content of the "out-of-size" Petition, prepared the Brief in Opposition, and the Petitioner possesses no right under the Rules to change the content of the Petition which he filed just prior to the expiration

of the 90-day period. Those new matters or omitted matters or substituted matter, coming after the expiration of the 90-day period, come too late. To permit their late filing is to prejudice the respondent working within the Rules.

CONCLUSION

Respondent requests that the substituted printed Petition not be grounds for the Writ; and that it be dismissed.

Respectfully submitted,

John W. Benoit, Jr.

JOHN W. BENOIT, JR.
Deputy Attorney General

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of the Supreme Court of the United States, the undersigned, counsel of record for the Respondent, on the date written below, did deposit a copy of the above Brief in Opposition in the United States Post Office at Augusta, Maine, first class postage prepaid, addressed to petitioner's attorney as follows: William A. Mann, Esquire, 308 Colorado Building, Washington, D. C.

Dated: February 10, 1970.

JOHN W. BENOIT, JR.
Deputy Attorney General
State House
Augusta, Maine

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IN THE

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OCTOBER TERM, 1969

No. 1079[redacted]

GROVER G. ALEXANDER, *Petitioner*

v.

CHARLES SHARPE, *Respondent*

STATE OF MAINE, *Respondent*

v.

GROVER G. ALEXANDER, *Petitioner*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

REPLY BRIEF

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February 13, 1970

Washington, D. C. · THIEL PRESS · 202 · 393-0625

IN THE

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OCTOBER TERM, 1969

No. 1079 [redacted]

GROVER G. ALEXANDER, *Petitioner*

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STATE OF MAINE, *Respondent*

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GROVER G. ALEXANDER, *Petitioner*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MAINE

REPLY BRIEF

Respondent has filed a MOTION TO DISMISS as well as a BRIEF IN OPPOSITION.

The Petitioner respectfully points out that *Rule 24* expressly provides that: *"No Motion by a respondent to dismiss a petition for certiorari will be received."* The argument contained in the Motion should have been set forth in the Brief or a supplemental thereto.

MOTION TO DISMISS

With respect to the Motion to Dismiss, Petitioner replies as follows:

The original Petition for Certiorari was reasonably filed on January 15, 1970. Petitioner added supplemental material and caused the Petition to be printed in regular form. Thereafter, on January 23, 1970, Petitioner substituted the printed Petition for the original and served copies on Counsel for the Respondent. The substitution was made with permission of the Clerk. And after the objection to the substitution was raised by Respondent, Petitioner caused the original Petition to be printed and filed.

The substituted Petition contains the same basic facts, contentions and arguments as are set forth in the original Petition. The additions are for the most part references and direct quotes from the record as well as enlargement of the basic arguments. The deletions and changes in sentence structures were necessary for composition and continuity.

Petitioner feels that there has been compliance with the Rules; and particularly that no prejudice has resulted to the Respondent. Petitioner therefore askes that the Petition not be denied on this ground.

BRIEF IN OPPOSITION

With respect to the Brief in Opposition, Petitioner replies as follows:

Jurisdiction

Petitioner is seeking a review of the Opinion dated October 20, 1969. All of the questions and arguments are addressed to that Opinion. However, the Opinion of October, 1969 must be read and discussed in conjunction with the Opinion of August, 1968 in that the former incorporates and passes upon in part the constitutional questions raised by reference to the legal principles set forth in the

latter. APPENDIX 2, page 17a. Moreover, Rule 23(i) seems to require . . . ."opinions in companion cases." It would seem that this matter became ripe for review finally on October 20, 1969. And failure of the Maine Court to pass upon constitutional questions properly raised is as good a basis for the jurisdiction of this Honorable Court as the Maine Court to have decided such questions erroneously.

QUESTONS PRESENTED

Respondent in this connection has failed to present a substantial question for the Court's consideration. Petitioner relies on the questions set forth in the Petition.

STATEMENT OF THE CASE

Counsel for Respondent suggests that Petitioner has "misstated" the facts with respect to the courtroom incident. It is interesting to note, however, that there is no explicit denial of the cause of conduct Petitioner attributes to the Trial Judge. The factual over-simplicification set forth on Page 7 of the Brief is hardly worthy of this Court's consideration.

ARGUMENT

I

Petitioner respectfully urges that he is seeking review of the final Opinion of October 20, 1969. Respondent surely must recognize the desirability and propriety of the inclusion and reference to the Opinion of August 15, 1968.

II

The Record *does* support Petitioner in his recitation of the facts.

III

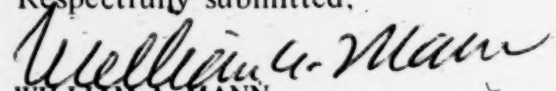
Petitioner is *not* "unsure about his challenge to the opinions below." The headings used in the Petition under "REASONS FOR GRANTING WRIT" were taken directly from the language and suggested forms contained in *Stern and Gressman.* Use of the word, *probably*, is not an indication of Petitioner's questionable position as Respondent suggests. The usage was taken directly from Rule 19, 1-(a). Petitioner anticipates that this Court will decide whether or not the Opinion of October 20, 1969 is erroneous. Until that time we will have to be content with our contention that the Opinion is "probably not in accord with applicable decisions of the Supreme Court of the United States."

Finally, in this connection Petitioner feels that the federal question of trial by jury is adequately raised. We are at a loss to understand the statement of Respondent at page 15 of the Brief wherein he says, ". . . .No federal question is raised." This Court is respectfully referred to Questions No. 2 and No. 6 under "QUESTIONS PRESENTED" in the Petition and the discussion of the jury trial issue under "REASONS FOR GRANTING WRIT."

CONCLUSION

The Writ should be granted for the reasons set forth in the Petition.

Respectfully submitted,



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1079

GROVER G. ALEXANDER, *Petitioner*

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CHARLES SHARPE, *Respondent*

STATE OF MAINE, *Respondent*

v.

GROVER G. ALEXANDER, *Petitioner*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

PETITION FOR REHEARING

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March 4, 1970

Washington, D. C. · THIEL PRESS · 202 · 393-0625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

GROVER G. ALEXANDER, *Petitioner*

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CHARLES SHARPE, *Respondent*

STATE OF MAINE, *Respondent*

v.

GROVER G. ALEXANDER, *Petitioner*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MAINE

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order: (1) vacating its denial of the Petition for Writ of Certiorari, entered on February 24, 1970, and (2) granting the Petition. As grounds for this motion Petitioner states the following:

1. THE SEVEN QUESTIONS PRESENTED IN THE INSTANT CASE ARE PARTICULARLY TIMELY.

It is submitted, that the issues in the instant case are identical to those that will undoubtedly be presented to this Court in connection with recent contempt of court convictions of attorneys in various State and United States District Courts, as well as the recent trial referred to by the news media as the trial of "Chicago Seven." Petitioner hastens to point out that by reference to the "Chicago Seven" incident and other contemporary contempt citations he does not suggest that his conduct was comparable in degree to that of the alleged contemnors. Petitioner contends simply that the legal and constitutional principles are identical with respect to the rights of the accused.

Petitioner urges to this Court that the entire area of law relating to the disqualification of a presiding trial judge in instances involving a personal criticism of or personal involvement of the presiding judge urgently needs clarification and redefinition. The doctrine and rationale established by *Cooke v. United States*, 267 U.S., 517 at 539 and *U.S. v. Bradt*, 294 Fed. 2nd, 879 and *Sacher v. United States*, 343 U.S.1 at page 8 and *Offut v. United States*, 348 U.S. 11 at page 14 does not clearly define the respective rights of the presiding judge and counsel under the circumstances present in the instant case. Moreover, it is felt that the issue of Trial by Jury in cases involving the disqualification of the presiding justice is not clearly determined under the doctrine of *Duncan v. Louisiana*, 88 S.Ct. 1444; *Bloom v. Illinois*, 88 S.Ct. 1477 and *Cheff v. Schnackenberg*, 86 S.Ct. 1523.

In this connection, Petitioner is asking this Honorable Court to determine the proper procedure in instances wherein the Trial Judge is, in fact, *disqualified*. That is, a choice between a proceeding similar to that contemplated by Rule 42(b), or, Trial by Jury. In the former, the reference to another Justice for determination is further clouded by the "petty offense" rule announced in CHEFF. It is

possible, and in many instances probable, that, after hearing or trial, the Justice to whom a case is referred shall feel a penalty greater than six (6) months is necessary and that he is thereby precluded from finally determining the matter. The matter then becomes subject to Trial by Jury under CHEFF. This technique seems circuitous and perhaps cumbersome, if not unconstitutional, in and of itself. This analysis is particularly true in instances wherein the permissible punishment is open-ended as in Petitioner's case. In other instances wherein the prescribed maximum punishment falls within the CHEFF rule, no problem is presented. The latter right of Trial by Jury is the only all-inclusive rule in instances wherein the offended Justice is disqualified. Moreover, the exact point at which an offense ceases to be "petty" in State Courts has not been settled.

The frequent incidence of criminal contempt proceedings against trial counsel at the present time seems to add a great degree of public urgency and public importance to the problem as well as the major importance to the Bench and Bar on a national level. In the instant case Petitioner wishes to reemphasize the claim of *prejudice* and *disqualification* of the Trial Judge as set forth in the Petition and amendments thereto. Such circumstances seem to place the instant case clearly in focus with respect to the national consequences of similar criminal contempt proceedings. Again, this Court's attention is respectfully directed to the fact that the Brief in Opposition filed by the State of Maine did not explicitly deny in a single instance the course of conduct attributed to the Trial Judge as set forth in the Petition.

2. THE INCARCERATION OF A PROMINENT TRIAL ATTORNEY, WITHOUT TRIAL WHERE THE TRIAL JUDGE WAS BOTH ACCUSER AND FACT FINDER, REFLECTS ADVERSELY ON THE ENTIRE JUDICIAL SYSTEM.

In the instant case if the entire Petition is reduced to its simplest terms, it is submitted, that it reflects that an experienced and aggressive trial attorney who, during an ex-

change between the Court and Petitioner relating to what Petitioner felt to be one in a series of improper and arbitrary rulings by the Court, the Trial Judge stood up, shouted at the Petitioner, called him incompetent and otherwise humiliated Petitioner in the presence of the Jury. The Petitioner replied, "I think it demonstrates your prejudice without doubt." This Court will recall that the incident occurred at 4:55 p.m. on the second day of a personal injury trial wherein the Trial Judge had repeatedly by looks, unwarranted comments and interference and vocal intonations demonstrated his hostility toward Petitioner.

In this connection, Petitioner is asking this Honorable Court to establish and define the rights of litigants and counsel in instances of this type wherein the Trial Judge, without justification, is felt to be prejudicial and arbitrary; and that such error cannot be corrected through the usual appellate process. In short, the appellate process does not always afford litigants in all instances a complete remedy under the present circumstances involving serious error beyond that of a breach of the rules of evidence and orderly trial procedure. The doctrine set forth in *Sacher v. United States*, 343 U.S.1, 72 S.Ct. 451 at page 343, is unclear in this respect. In the Petitioner's case the erroneous and arbitrary rulings were accompanied by the hostility and attitude of the Court toward the Petitioner as established by the record. The element of improper conduct on the part of the Court was absent in the *Sacher* case. Maine, as well as many other jurisdictions, does not provide for the procedural safeguards of an Affidavit of Prejudice on the part of the Trial Judge as is contained in the Federal Rules. If proper within the scope of the Petition, Petitioner wishes to raise the question of "freedom of speech" within the provisions of the First Amendment, United States Constitution.

The Trial Judge's unwarranted attitude toward Petitioner began on voir dire examination of a Prospective Juror and continued throughout the trial. Petitioner feels that this

claim is adequately supported in the record, all as set forth in the Petition and amendments thereto. No Certificate of Contempt was filed in the matter for a period of 13 months and 22 days; and at no point was Petitioner permitted to challenge the Certificate. Moreover, the Maine Supreme Judicial Court refused to examine the Certificate to determine guilt or innocence, notwithstanding the fact that Petitioner explicitly denies the conduct charged except the statement of "prejudice." Petitioner was prepared to present numerous witnesses who were present to refute the alleged conduct.

Petitioner is not an habitually errant lawyer given to contemptuous conduct and/or questionable professional ethics. On the contrary, he is a successful negligence trial-lawyer who has practiced law for a period of 15 years, served 10 years as a Police Court Judge under an appointment by the then Governor of Maine, United States Senator Edmund S. Muskie, has been a member of the Bar of the United States Supreme Court since 1961 as well as a member of several other Local, State and National Bar Associations. The procedure outlined in the preceding paragraph seems to violate Petitioner's right of Due Process and is of great public and judicial concern on a national level.

3. THE ISSUES OF PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, AND SELF-INCRIMINATION SEEM EQUALLY IMPORTANT TO THE BENCH AND BAR.

Petitioner is asking this Honorable Court to define the rights of counsel and litigants when confronted with criminal contempt proceedings. Particularly, should a contemnor persist in his accusation of prejudice against a Trial Judge in order to preserve the appellate record? Or, should a contemnor be contrite and repentant and run the risk of admissions, self-incrimination and the appearance of guilt, and yet pursue his appellate rights if he, in fact, believes himself to be innocent and his constitutional rights violated? The preservation of the unique relationship between Bench and Bar seems to demand a strict adherence to Due Process requirements as well.

4. ONE OF THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT CONSIDERED THAT THE PETITION SHOULD HAVE BEEN GRANTED.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the Order of Denial, vacate that order, grant the Petition and review the judgment and opinion below.

Respectfully submitted,

William A. Mann
308 Colorado Building
Washington, D.C. 20005
Counsel for Petitioner

March 2, 1970

CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specifically in Rule 58(2).

William A. Mann
308 Colorado Building
Washington, D.C. 20005
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 1970 copies of the Petition for Rehearing were mailed, postage prepaid, to: John B. Benoit, Assistant Attorney General, State House, Augusta, Maine, Counsel for Respondent. I further certify that all parties required to be served have been served.

William A. Mann
308 Colorado Building
Washington, D.C. 20005
Counsel for Petitioner